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No. 1285

In the Supreme Court of the United States

OCTOBER TERM, 1967

ROBERT LYNN MARTIN and MAURICE DANIEL DODSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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Petitioners were convicted in a trial to the United States District Court for the Southern District of Texas of using the facilities of interstate commerce for the transmission of wagers, and information assisting in the placing of such wagers, in violation of 18 U.S.C. 1084. On May 29, 1966, each petitioner received a two-year suspended sentence, a $10,000 fine, and probation for five years. Petitioner Martin's petition for a writ of certiorari prior to judg-

ment of the court of appeals was denied by this Court. *Martin* v. *United States*, 385 U.S. 1008. The court of appeals subsequently affirmed the convictions (Pet. Apps. A, B).

The evidence, as stipulated by the parties (R. 14, 104-107), and not challenged here, showed that petitioners engaged in the interstate transmission of bets and wagers on football games, and information assisting in placing those wagers, by telephone, from Houston, Texas, to Las Vegas, Nevada.

There is no occasion to review the question presented by petitioners—"Whether Congress has the power under the commerce clause to prohibit all interstate transmission of wagers, by means of non-governmental facilities, regardless of the lawfulness of the wager in the States where transmitted and received" (Pet. 2). Contrary to petitioners' assumption, Texas law contains a clear and unequivocal prohibition against the type of activity involved in this case. The relevant statute provides:

> No person in this State shall enter into an agreement with another, either orally, written or implied, whereby either one or both shall bet or wager money or anything of value, or otherwise become a party to any gambling scheme based upon the final result or outcome of any play or portion thereof of a game of baseball or football. * * * [Tex. Rev. Pen. Code Ann. art. 646 (1952).]

Petitioners cannot escape the reach of this statutory policy by the argument, based on contract law (see Corbin, Contracts § 79 (1963)), that the wager was

not complete until accepted in Las Vegas (Pet. 9-11). The Texas statute also prohibits any person from becoming "* * * a party to any gambling scheme based upon the final result or outcome of any play or portion thereof of a game of baseball or football"—the very activity conducted by these petitioners.[1] Even under the test which petitioners propose (Pet. 11), Section 1084 may constitutionally be applied in this case because the federal statute assists the State of Texas in enforcing its policy against the gambling business by punishing those who, like petitioners, use interstate communication facilities to subvert that policy.

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[1] The Texas policy is not diminished by the fact that a Texas civil court would enforce an agreement made in Texas to purchase a Mexican Lottery ticket and divide the winnings, *Castilleja* v. *Camero*, 414 S.W. 2d 424 (Tex. Sup. Ct.), or by the fact that a federal district court, sitting in Texas, would enforce a futures contract, valid where made (Louisiana), *Jacobs* v. *Hyman*, 286 Fed. 346 (C.A. 5). In *Castilleja*, there was no Texas policy against entering into an agreement to purchase a lottery ticket in Mexico; the only relevant statute prohibited the establishment of a lottery and the sale of lottery tickets within the State. Tex. Rev. Pen. Code Ann. art. 654. In *Jacobs*, the court under general principles of comity and full faith and credit, enforced a contract which was valid where made and which did not involve conduct that was illegal under Texas law.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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